

LEWIS  
ANDROCA  
LLP

L A W Y E R S

E-Filed on  
10/23/2008

3993 Howard Hughes Parkway, Suite 600  
Las Vegas, Nevada 89169  
Facsimile (702) 949-8321  
Telephone (702) 949-8320

40 North Central Avenue, Suite 1900  
Phoenix, Arizona 85004-4429

Susan M. Freeman AZ State Bar No. 004199  
Email: sfreeman@lrlaw.com  
Rob Charles NV State Bar No. 006593  
Email: rcharles@lrlaw.com  
John Hinderaker AZ State Bar No. 018024  
Email: JHinderaker@lrlaw.com

Attorneys for USACM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:

USA Commercial Mortgage Company,

USA Capital Realty Advisors, LLC,

USA Capital Diversified Trust Deed Fund,  
LLC,

USA Capital First Trust Deed Fund, LLC,<sup>1</sup>

USA Securities, LLC,<sup>2</sup>

Debtors.

**Affects:**

- ☐ All Debtors  
☒ USA Commercial Mortgage Company  
☐ USA Capital Realty Advisors, LLC  
☐ USA Capital Diversified Trust Deed Fund, LLC  
☐ USA Capital First Trust Deed Fund, LLC  
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR<sup>1</sup>  
Case No. BK-S-06-10729-LBR<sup>2</sup>

**CHAPTER 11**

Jointly Administered Under Case No.  
BK-S-06-10725 LBR

**NUNC PRO TUNC MOTION TO  
FURTHER EXTEND DEADLINE TO  
FILE OBJECTION TO  
ALLOWANCE OF CLAIMS  
(with Certificate of Service)**

Date: November 18, 2008  
Time: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") by Lewis and Roca LLP, its counsel, moves this Court for an order *nunc pro tunc* pursuant to 11 U.S.C. § 502(b) and Bankruptcy Rules 3007 and 9006(b)(1) enlarging the deadline for filing objections to allowance of claims, and in particular unsecured claims, for an additional 120 days from

<sup>1</sup> This bankruptcy case was closed on October 12, 2007.

<sup>2</sup> This bankruptcy case was closed on December 26, 2007.

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

October 10, 2008 to February 9, 2009. This Motion is based upon the following Memorandum of Points and Authorities and is supported by the Court's record and the declarations of Edward M. Burr and John Hinderaker filed this date.

### MEMORANDUM

On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third Amended Joint Chapter 11 Plan of Reorganization" as modified herein [DE 2376]. Notice of Entry of the Confirmation Order was filed on January 9, 2007, and served on January 11 and 12, 2007 [DE 2387].

There is no deadline for claims objections after plan confirmation under either the Bankruptcy Code or Rules. However, Section VII A.1 Objection to Claims of the Plan provides:

Unless otherwise extended by the Court, objections to the allowance of Claims and Equity Interests shall be filed and served upon the entities asserting such Claims or Equity Interests as follows: (A) for any and all Claims and Equity Interests to which the General Bar Date applies, ninety (90) days after the Effective Date....

Accordingly, the deadline to file an objection to such Claim was 90 days after the Effective Date of March 12, 2007, or June 10, 2007. The Court extended the deadline to October 9, 2007, after a hearing [DE 4097]. The Court extended the deadline to October 15, 2007, by a bridge order after a hearing on August 23, 2007 [DE 4625]. On October 11, 2007, the Court entered an order [DE 4971] extending the deadline to February 12, 2008. On January 22, 2008, the Court entered an order [DE 5709] extending the deadline to June 12, 2008. On May 13, 2008, the Court entered an order [DE 6347] extending the June 12, 2008 deadline to October 10, 2008.

## I. PROOFS OF CLAIM AND CLAIMS OBJECTIONS

### A. Overview

To date there have been seven administrative claims filed totaling \$2,016,499.08; 103 priority claims filed totaling \$7,751,955.91; 1,676 secured claims filed totaling

\$297,052,436.44; 1232 unsecured claims filed totaling \$627,644,519.30; and 79 unknown claims filed totaling \$649,390.57. Additional claims were scheduled by Debtors.

### **B. Objections**

To date, the Trust has filed:

- Objections to 1667 secured claims that have been sustained and reclassified as unsecured in aggregate of \$296,160,362.79.
- Objections to 76 priority claims that have been sustained and reclassified as unsecured in aggregate of \$5,122,243.
- One objection to the status of an administrative claim totaling \$14,248 that has been sustained and reclassified as unsecured.
- Objections to 66 “Wrong Debtor” claims in the amount of \$12,098,062. All but one of those objections were sustained or a stipulation withdrawing the subject claim was approved.
- Objections to three claims not enforceable against USACM in the amount of \$75,503,580; one of these claims totaling \$12,841,680 remains unresolved.
- Objections to 147 claims for lack of documentation in the amount of \$19,708,808; 23 of these objections to claims totaling \$1,920,750 were withdrawn due to claimants sending in sufficient supporting documents and 124 objections were sustained totaling \$17,788,058.
- Objections to 34 claims on miscellaneous grounds in the amount of \$39,394,064. Two of these objections were sustained totaling \$3,502,383; 17 objections have stipulated withdrawals totaling \$4,884,078; five claims totaling \$6,416,532 have orders allowing the claim; and ten objections totaling \$24,591,071 are unresolved.
- A total of 779 objections to Direct Lenders claims in the amount of \$59,688,216, principally on loans paid in full by the borrowers. The Court

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 has sustained these objections or the claimants have agreed that they are not  
2 making a claim based upon the paid loan in question.

- 3 • A stipulation has been executed and an order signed which provides for the  
4 disallowance of the Spectrum and Weddell proofs of claim in the amount of  
5 \$125,000,000.

6 The Trust prosecuted objections to claims, including the Loans known as Hasley  
7 Canyon; Fiesta Beaumont \$2.4 million; Ashby Financial Company \$7,200,000; Glendale  
8 Tower Partners, LLC; Golden State Investments II; 5252 Orange, LLC; Midvale Market  
9 Place, LLC; Urban Housing Alliance – 435 Lofts Loan; Boise/Gowen 93, LLC; LCG  
10 Gilroy, LLC; J Jireh's Corporation; One Point Street, LLC – HFA North Yonkers; Goss  
11 Road Loan; Elizabeth May Real Estate Loan; Slade Development; Wasco Investments,  
12 LLC; I-40 Gateway West, LLC 2nd; Cottonwood Hills, LLC; Standard Property  
13 Development, LLC; and Palm Springs Marquis Hotel. The Trust has other adversary  
14 proceedings pending that constitute claims objections.

15 Further, as the Trust has received information from claimants, it has entered into  
16 stipulations for the allowance and disallowance of priority and unsecured claims.  
17 Conversely, some claimants have stipulated to either withdraw their claims or have them  
18 reclassified as unsecured claims upon discussion with the USACM Trust's counsel.

19 The remaining direct lender claims relate to loans that (1) fully performed, but  
20 involve diverted principal; (2) partially performed; (3) are non-performing or still  
21 outstanding. The extent to which those loans perform and/or the direct lenders may be  
22 compensated from the sale of collateral securing the loans has a major impact on the  
23 amount of the claims. The Trustee is handling these claims on a loan by loan basis.

24 Not all of the claims objections can be resolved through motions. The Court has  
25 ordered that the Trust's objection to claim 1366 of Los Valles Land & Golf, LLC be  
26

1 consolidated with a related adversary proceeding filed by the Trust against Los Valles and  
2 its guarantor, Dan S. Palmer, Jr.

3 **II. DISCUSSION**

4 This Court has previously considered and granted, after notice, and without  
5 opposition, extensions of the Plan's deadline for claim objections under Bankruptcy Rule  
6 9006(b)(1), provides that except as otherwise provided by the Rule:

7 when an act is required or allowed to be done at or within a specified period  
8 by the rules or by a notice given thereunder or by order of court, the court  
9 for cause shall at any time in its discretion (1) with or without motion or  
10 notice order the period enlarged if the request therefore is made before the  
11 expiration of the period originally prescribed or as extended by a previous  
12 order or (2) on motion made after the expiration of the specified period,  
13 permit the act to be done where the failure to act was the result of excusable  
14 neglect.

15 Here, the request for an extension comes after the October 10, 2008 deadline for  
16 filing objections to Allowance of Claims has already expired. Thus, the Court must find  
17 good cause for extending the deadline and that the failure to timely request the extension  
18 was the result of excusable neglect.

19 This request is supported by good cause. Nothing in the Plan prohibits the Court  
20 from extending the deadline for objecting to claims. The previous extension have all been  
21 granted without prejudice to further extensions. The Trust has been requesting only 120  
22 day extensions so that the Court could monitor the claims process. The other direct lender  
23 claims to which the Trustee has yet to object relate to loans that (1) fully performed, but  
24 involve diverted principal; (2) partially performed; (3) are non-performing or still  
25 outstanding. The extent to which those loans perform and/or the direct lenders may be  
26 compensated from the sale of collateral securing the loans has a major impact on the  
amount of the claims. The Trustee is handling these claims on a loan by loan basis. There  
are also some non-direct lender claims to which the Trust may object.

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

Moreover, as to most of the outstanding loans, Compass (or its successors) and the USACM Trust (Placer Vineyards) are still attempting to collect on those loans, and, therefore, it is difficult, if not impossible, to accurately value the claims at this time.

For all of these reasons, the USACM Trust believes it needs more than 120 days to complete its review of the claims and file objections, but asks only for 120 days now, so that the Court can continue to monitor the claims resolution process.

This request for an extension is filed after the deadline has run. Therefore, the Court must also find “excusable neglect.” In evaluating whether neglect is excusable, a district court must consider the four factors established by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*:<sup>3</sup> “(1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party's conduct was in good faith.”<sup>4</sup> The Supreme Court in *Pioneer* rejected a rigid rule for excusable neglect, applying a broader standard that permitted a finding of excusable neglect even where the filer was in control of the situation that caused the delay.<sup>5</sup> Taken together, the four factors weigh in favor of granting the motion:

First, there is no danger of prejudice to the non-moving parties. Indeed, the opposite is true. If the Court does not grant the extension, then less than valid or overstated claims will be allowed and those claimants with legitimate claims will be prejudiced by a diminished distribution.

<sup>3</sup> *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1498, 123 L.Ed.2d 74 (1993).

<sup>4</sup> *Pincay v. Andrews*, 389 F.3d 853, 858 (9<sup>th</sup> Cir. 2004).

<sup>5</sup> 507 U.S. at 386-95 (“[E]xcusable neglect’ . . . is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer.”).

LEWIS  
AND  
ROCA  
LLP  
LAWYERS

1 Second, the delay in seeking the extension is short. This motion seeks a 120 day  
2 extension and it is filed less than two weeks after the deadline ran on October 10, 2008.

3 Third, the failure to timely move for an extension is attributable in part to a serious  
4 family medical emergency that arose for the Trustee's attorney who is principally in  
5 charge of preparing claims objections.

6 Fourth, moving counsel has at all times acted in good faith.

7 **III. CONCLUSION**

8 The USACM Trust requests that the Court enter its order *nunc pro tunc* further  
9 extending the deadline to file objections to allowance of claims until February 9, 2009,  
10 without prejudice to an additional extension.

11 Dated: October 23, 2008.

12 **LEWIS AND ROCA LLP**

13  
14 By /s/ JH (#018024)

Susan M. Freeman, AZ 4199 (pro hac vice)

15 Rob Charles, NV 6593

16 John Hinderaker, AZ 18024 (pro hac vice)

*Attorneys for USACM Liquidating Trust*

LEWIS  
AND

ROCA  
LLP

L A W Y E R S

Proof of service

Copy of the foregoing posted on the USACM Liquidating Trust website and served on October 23, 2008 via email, where an email address is listed, or by first class mail, postage prepaid, addressed to:

All parties in interest listed on the Post Effective Date Service List on file with the Court and all parties on the pre-confirmation service list, which includes all direct lenders

s/Renee L. Creswell

Lewis and Roca LLP